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IN THE

Supreme Court of The United States

OCTOBER TERM, 1964

NO. 58

HERBERT E. CALLENDER,
JAMES O'CONNOR, and
LESLIE LEE SMITH,

Petitioners,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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FEDERAL:

Title 28, United States Code, Section 1257 (3) 2

FLORIDA:

Section 79.10, Florida Statutes 6, 12

Article V, Section 4 (2), Florida Constitution 7-8, 9-10, 12, 13, 14, 17

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

NO. 996

HERBERT E. CALLENDER,
JAMES O'CONNOR, and
LESLIE LEE SMITH,

Petitioners,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRITS OF CERTIORARI TO THE SUPPREME COURT OF FLORIDA

OPINION BELOW

Respondent concedes that there were no written opinions from any of the Florida appellate judiciary with regard to the cases of the three petitioners.

JURISDICTION

Petitioners' recitation of the prosecutive disposition of their respective cases is substantially as represented in their petition at page two thereof.

Respondent has no quarrel with the jurisdiction of this Court pursuant to Title 28, United States Code; Section 1257 (3) or under any other provision, at least for purposes of determining whether to decline an assumption thereof.

QUESTIONS PRESENTED

Respondent has no quarrel with the alleged questions at page three of their petition presented for this Court's consideration by the petition herein being discussed.

STATUTORY AND CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

Respondent likewise has no quarrel with the statutory and/or constitutional provisions alleged to be involved in this case as set out in their petition at page four thereof.

STATEMENT OF THE FACTS

Despite the fact that the resumé of the facts allegedly supported by the record in this case leave room for differences of interpretation in this case and do not actually contain all the pertinent evidence found therein, respondent will accept it as set out by petitioners in their brief at pages five through twelve.

Respondent will endeavor to demonstrate even to the satisfaction of petitioners (hopefully) that it does not matter what their statement of facts contains in light of the jurisdictional deficiencies which should make it improper and/or impossible for this Court to assume jurisdiction of this case.

REASONS FOR DECLINING TO GRANT THE WRITS OF CERTIORARI PRAYED FOR BY PETITIONERS

There can be no doubt but that this Court has long followed its self-imposed principle that it will decline to review the judgment of a state court when said judgment is based upon an adequate and independent non-federal ground—without regard to whether a federal question was involved. **Murdock v. Memphis,** 20 Wall. 590, 636; **Berea College v. Kentucky,** 211 U. S. 45, 53; **Fox Film Corp. v. Muller,** 296 U. S. 207.

Just as certain is it correct to say that once it has been made apparent that the state court judgment in question is in fact based upon a non-federal ground, this Court must then determine whether that ground was in fact adequate to support the judgment without regard to any conclusion of the federal question which may have been involved. **Staub v. Baxley**, 355 U. S. 313, 318-319; **N. A. A. C. P. v. Alabama**, 357 U. S. 449, 455.

The adequacy referred to above is met if said ground is (a) broad enough, (b) independent and (c) tenable.

The matter of the scope of the non-federal ground is discussed in the **Murdock** case, supra, and as well in **Eustis v. Bolles**, 150 U. S. 361, 370.

The independence of said non-federal ground is discussed extensively in the cases of **Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co.**, 243 U. S. 157, 164; **Ivanhoe Irrigation District v. McCracken**, 357 U. S. 275, 290.

We terminally observe that the matter of whether said non-federal ground is a tenable one, especially in a case (similar to the one at bar) dealing with federally assured rights, is perhaps best illuminated by this Court's opinions in the cases of **Davis v. Wechsler**, 263 U.S. 22, 24; **N. A. A. C. P. v. Ala.**, supra.

In the case at bar, respondent vigorously contends that the action of the Florida Supreme Court sought

to be assailed by petitioners was in every way based upon a non-federal ground, which ground was independent of any federal question, was broad enough without reference to the federal question and was so tenable as to almost require this Court to conclude that said ground was adequate and therefore decline to grant review thereof.

In accord with the above, this Court has consistently held that it is essential to show that not only must the state court's decision rest on a federal question, but it must also appear that a decision as to such question was necessary to the state court's determination. **De Saussure v. Gaillard,** 127 U. S. 216, 8 S. Ct. 1053, 32 L. Ed. 125 and **Lynch v. New York ex rel. Pierson,** 293 U. S. 52, 55 S. Ct. 16, 79 L. Ed. 191. See also annotations in 100 L. Ed. 1200, 1203 and 84 L. Ed. 925, 935, et seq.

Quite apart from the fact that the decision of the Supreme Court of the State of Florida denying petitioners review by appeal in nowise turned on or was concerned with either a federal question or an issue of federally assured due process, even if it had been so colored, it is axiomatic that this would not **per se** constitute a valid basis upon which petitioners could now complain. In this regard, the Court's attention is invited to its own pronouncements anent this matter.

Pierce v. Somerset Railway, 171 U. S. 641, 19 S. Ct. 64, 43 L. Ed. 316; **Leonard v. Vicksburg, Shreveport and Pacific Railroad Company,** 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108; **Utley v. City of St. Petersburg, Florida,** 292 U. S. 106, 54 S. Ct. 593, 78 L. Ed. 1155; **Lynch v. New York ex rel. Pierson,** supra; **Brooks v. Missouri,** 124 U. S. 394, 8 S. Ct. 443, 31 L. Ed. 454; **Buck v. California,** 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775. See also annotations, 100 L. Ed. 1200, 1203-6; 84 L. Ed. 925, 940, et seq.

Moreover, this Court has indicated that it will decline to review decisions of state courts where it appears that the person complaining of an alleged violation of some right under the Federal Constitution has by his own acts or omission to act waived such right. **Pierce v. Somerset Railway,** supra; **Leonard v. Vicksburg, Shreveport and Pacific Railroad Company,** supra.

The basic pronouncements to be found in the immediately aforementioned decisions of this Court were brought forth and galvanized in the realm of criminal law by this Court's own recent decision in the case of **Durley v. Mayo,** 351 U. S. 277, 100 L. Ed. 1178, 76 S. Ct. 806, in which it concluded that the Florida Supreme Court, in denying the petitioner relief by habeas corpus, rested its decision on adequate state grounds; they being respectively statutory **res adjudicata (Section 79.10, Florida Statutes)** and substantive or case law **res adjudicata (Washington v. Mayo,** Fla. 77 So. 2d 620, 621).

That either or both of the bases for the application of that doctrine by the Supreme Court of Florida was an adequate state ground in this Court's view needs no further saying.

In the instant proceedings, we are concerned neither with a statutory pronouncement nor with some case law intepretation of a principle of state law, but rather with the undeniable fact that the Supreme Court of Florida simply did not have jurisdiction to grant review by appeal to petitioners.

Nor need this Court consider that the Supreme Court of Florida might have rested its order of dismissal on an adequate state ground as was the case in **Durley v. Mayo,** supra. It may be categorically stated and respondent so does, that the order of the Supreme Court of Florida in question was in fact founded upon state grounds which are conclusively adequate.

ARGUMENT

In the instant proceedings we need only concern ourselves with what is the highest form of law to which one can turn in the State of Florida; a constitutional provision, to-wit: **Article V, Section 4 (2),** the pertinent provisions of which read as follows:

"§ 4. **Supreme Court**

* * *

"(2) **Jurisdiction**

* * *

"Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. * * *"

The matter quoted above, was adopted as a constitutional amendment in the general election held on November 6, 1956, to take effect on July 1, 1957. By its advent, the people of the State of Florida approved the precise manner and mode in which all litigants must seek appellate review in the Supreme Court of Florida. This effectively supplanted all other means by which that review could theretofore be secured. At this writing, the procedure delineated therein remains inviolate.

It should be clear that Section 4, supra, neither says nor contemplates that litigants who feel themselves aggrieved by some judicial pronouncement are free to run helter-skelter to any court that may happen to suit their fancy with a cavalier disregard for a constitutional amendment which specifically spells out not only when and if but as well, where an appeal shall be perfected.

The provisions of Article V, Section 4 (2), supra, are a constitutional commandment created by the citizens of the State of Florida binding on everyone touched thereby in every sense of the word. The article in question deprives no one of review no matter what his

circumstances—it rather brings into focus that which theretofore may have been nebulous. Its pertinent provisions spell out the precise bases upon which a litigant aggrieved by a decision of a district court of appeal may seek review in the Florida Supreme Court (specifically by appeal).

We note that it could not be urged (indeed petitioners specifically did not) that the district court of appeal (by its per curiam denial of certiorari) initially passed upon the validity of a state statute.

Nor could it be urged (indeed petitioners specifically did not) that the district court of appeal (by its per curiam denial of certiorari) initially passed upon the validity of a federal statute.

Nor could it be urged (indeed petitioners specifically did not) that the district court of appeal initially passed upon the validity of a federal treaty. Respondent here notes that no federal treaty is in anywise connected with any aspect of this case from its birth to this date.

En fine, we contend that it certainly could not be urged (indeed petitioners specifically did not) that the district court of appeal (by its per curiam denial of certiorari) intially construed a controlling provision of either the Florida or Federal Constitution.

So it was that petitioners were faced with the constitutional requirement impressed upon them (Article

V, Section 4 (2)) that required a specific assertion that either of the several enumerated prerequisites in fact occurred (of course supported by record evidence thereof in order to secure review in the Florida Supreme Court by appeal. That they have not done that which all litigants must do who seek such review is, we submit, beyond cavil.

The record furnished by petitioners and particularly their pleadings and brief in support of their position demonstrates an absolute failure to prove, claim, allege or even show any interest in a review of the district court's per curiam opinion under the appropriate provisions of **Article V, Section 4 (2)**, supra. That such specifics are absolutely required in order to seek review by appeal in the Florida Supreme Court is beyond question. With reference to this constitutional requirement setting out the jurisdiction of the Florida Supreme Court to review district courts of appeal by appeal, it can be said that the Florida Supreme Court has, from time to time, been required to edify the bar of the State of Florida by repetitious and occasionally exhaustive opinions anent the point.

Certainly the most penetrating is the case of **In Re Kionka's Estate**, (Fla.), 121 So. 2d 644; an illuminating opinion wherein the Florida Supreme Court determines the circumstances under which it can and will review (on appeal) a decision of a district court of appeal. In so doing, it merely recites and interprets purely Florida law governing appellate procedure in this state. To substantially the same effect are the

cases of **State v. Furen**, Fla., 118 So. 2d 6; **Engel v. City of North Miami**, Fla., 115 So. 2d 1; **Bluesten v. Florida Real Estate Commission**, Fla., 125 So. 2d 567; and **City of Miami Beach v. State**, Fla., 111 So. 2d 437, 438.

Respondent notes that in the **City of Miami Beach** case, supra, the Florida Supreme Court said the following:

> "Upon consideration of the matter and an examination of the record and briefs in said causes, we fail to find that the subject decision of the District Court of Appeal initially passed upon the validity of any of the statutes and that, therefore, this Court is without jurisdiction to entertain the appeal and the same is hereby dismissed **ex mero motu.**" (Emphasis supplied)

This Court should quickly note that that is precisely the disposition which the Florida Supreme Court made of petitioners' appeal.

Based on the matters set out above with reference to the constitutional requisites imposed on litigants seeking a review by appeal in the Florida Supreme Court, it is respectfully submitted that the human imagination could not envisage a situation with less legitimate basis for seeking review by appeal than that which petitioners lamely presented to the Florida Supreme Court.

Returning to this Court's decision in the **Durley** case, supra; we find the legal fiction of **res adjudicata** as embodied in **Section 79.10**, supra, and Florida case law, to-wit: **Washington v. Mayo**, supra, neither one of which being possessed of the stature of a constitutional amendment; was considered by this Court as an adequate state ground upon which the Florida Supreme Court could summarily dismiss Durley's petition for habeas corpus.

It is therefore certainly no departure and indeed not even a step forward to conclude that the compulsion of a constitutional amendment prescribing just how Florida litigants in Florida cases involving Florida law (federal law only incidently as it may be raised) shall proceed to seek review in the Supreme Court of Florida by appeal is even more apparent.

The almost basic English pronouncements of **Article V, Section 4 (2)**, supra, do not present an obtuse writing incapable of being deciphered. No mystical qualities attach to it nor is it shrouded in doubt. It is simply a mandatory requirement which applies without exception to all who seek to come thereunder. Ergo, the Supreme Court of Florida in dismissing the appeal in this cause merely took notice of a complete failure or, as the case may be, refusal, by or on behalf of petitioners to proceed in conformity therewith.

If it be urged (petitioners do not) that the Florida Supreme Court should have treated their improper

attempt at appeal as a petition for certiorari, there is perhaps even less basis upon which they may complain here. The appropriate section of **Article V, Section 4 (2)**, supra, carefully and clearly delineates the procedure to be followed by litigants seeking certiorari review in the Florida Supreme Court from a decision of a district court of appeal. That provision reads as follows:

"§ 4. **Supreme Court**

* * *

"(2) **Jurisdiction.**

* * *

". . . The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

At the outset, respondent deems it appropriate to acknowledge that the district court of appeal rendered per curiam decisions without opinion. On the several occasions wherein the Florida Supreme Court has been asked to review a per curiam decision without opinion they have, almost without exception, consistently re-

fused to extend such review for a multitude of reasons, all of them constitutionally embedded.

A pungent rejection of appellate liberality in cases where review was sought of a per curiam decision without opinion, was rendered by the Florida Supreme Court in the case of **Carmazi v. Board of County Commissioners,** (Fla.), 104 So. 2d 727. Mr. Justice Drew, specially concurred, quoted from the case of **Thompson v. State,** 199 Ga., 250, 33 S. E. 2d 903, and concluded that the construction contemplated by our Constitution **(Article V, Section 4 (2)**—as quoted above) did not include the mere application of facts to constitutional provisions, but rather required such construction as would at least touch on the meaning of some provision of the Constitution directly in question—precisely what neither the trial court, circuit court nor the district court of appeal in this case were required to or did in fact do.

It should be clear that a per curiam decision without opinion such as petitioners sought to have reviewed by the Florida Supreme Court did not affect a class of constitutional or state officers. It should be equally clear that that same decision did not pass upon a question certified by said district court of appeal to be of great public interest. It seems inconceivable that petitioners could possibly urge that said decision was in direct conflict with a decision of another district court of appeal or of the Florida Supreme Court on the same point of law.

These jurisdictional prerequisites which must be alleged in a well-drawn petition intentionally requesting certiorari, if said petition is to be considered by the Florida Supreme Court, are at least as necessary to, and in fact are prerequisites imposed on parties improvidently seeking review in that court by appeal. To hold otherwise would invite mislabelled or misdirected appellate pleadings thereby requiring the Florida Supreme Court to not only read the entire record but conclude for the petitioners what they should have said in order that it in turn could consider whether to grant a particular form of review. This becomes a case of the tail wagging the dog.

Respondent is not yet acquainted with any judicial pronouncement in this land which requires the highest state court to plead correctly for petitioners who were represented by well-qualified and able counsel (of their own choosing) who specifically elected or refused as the case may be, to proceed in the manner directed by the Constitution of the State of Florida.

There are a host of cases in which the Supreme Court of the State of Florida has justified declining to review a per curiam decision of a district court of appeal by certiorari. The first of these is the case of **Lake v. Lake**, Fla., 103 So. 2d 639. The decision in the **Lake** case, supra, should be dispositive of this aspect of the matter before this Court. The principle an-

nounced by the **Lake** case, supra, is ably supported by the Supreme Court's opinion in the case of **South Florida Hospital Corporation v. McCrea,** Fla., 118 So. 2d 25, 27, when it said the following:

"At the risk of being tedious, we will again reiterate that unless we find a conflict in decisions of other appellate courts of this state on the point or points of law pronounced in the opinion of the District Court of Appeal in this case, we have no power or jurisdiction in any manner to disturb the judgment of the lower court. Courts of Appeal are and were meant to be courts of final appellate jurisdiction in the vast majority of cases, and in cases such as the one at bar it is only to harmonize and standardize decisions that this court may presume to interfere. As said by Mr. Justice Thomas in Lake v. Lake, supra:

"'Sustaining the dignity of the decisions of the district court of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case'.

"We therefore initially refrain from scrutinizing the action of the trial court or of the Court of Appeal as to the effect on the parties to the cause.

> If what was decided finds no contradiction in what this court or another District Court has said in their official pronouncements on the same point or points of law, then our authorized examination is complete and the writ of certiorari will be discharged. If there is contradiction we will undertake to resolve the conflict."

See also **Ansin v. Thurston**, Fla., 101 So. 2d 808; **Seaboard Airline Railroad Company v. Branham**, Fla., 104 So. 2d 356, and **Hakam v. City of Miami Beach**, Fla., 108 So. 2d 608.

So it is that petitioners; confronted with the unequivocal notation of the district court of appeal rendered on February 26, 1963, as follows:

"PER CURIAM.

Certiorari denied."

were constitutionally bound to follow the specific requirements of **Article V, Section 4 (2)**, in seeking only that review to which they were in fact entitled. Viewed within the framework of the certiorari which they never sought, it can be said, based upon the above, that they could make no legitimate claim for review in that fashion. Certainly their pleadings could never be said to have limmed the specific requirements of the aforesaid constitutional amendment with reference to appeals from the district courts of appeal.

CONCLUSION

Based upon the aforesaid, it conclusively appears that the petition for writs of certiorari requesting this Court's intercession should be denied.

Respectfully submitted,

JAMES W. KYNES
Attorney General

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Assistant Attorney General

Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Petition for Writs of Certiorari to the Supreme Court of Florida to the Honorables Carl Rachlin, Floyd McKissick, Charles Oldham, Webster Sweet, Ernest Finney, 38 Park Row, New York, New York, and Ernest Jackson, 410 Broad Street, Suite No. 208, Jacksonville, Florida, counsel for the petitioners, by mail, this ____ day of June, 1964.

GEORGE R. GEORGIEFF
Assistant Attorney General

Of Counsel for the Respondent.